SUPREME COURT OF THE UNITED STATES.

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No. 1, October Term, 1906.

S. A. REARICK,
Plaintiff in Error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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(19,801)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 299.

N. L. REARICK,

PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

DEFENDANT IN ERROR.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In the months of March and April, 1902, J. S. Kunkle, an agent in the employ of The Citizens' Wholesale Supply Company, an Ohio corporation, located in Columbus, Ohio, and there doing business as grocers, went from house to house in the borough of Sunbury, Pennsylvania, and took orders for such goods as are generally sold by grocers, to be filled by his

employer, said Company. These orders Kunkle forwarded to the Company at Columbus. The Company filled the orders by placing all the articles, except brooms, ordered by one individual, in a box or boxes in which no other goods were placed. The boxes were then closed and addressed to N. L. Rearick, at Sunbury, Pennsylvania. Rearick was the agent of the Company at that place whose duty it was to deliver the goods to the purchasers. On each box was also marked the name of the person who had purchased its contents and to whom it was to be delivered by Rearick.

The Company in filling the orders for brooms, bound together all those ordered by one person and tied thereto a tag, addressed to Rearick and marked with the name of the purchaser, preceded by the word "For." The brooms to fill several separate orders were then aggregated together and tied into bundles for convenience in shipment. (Record, p. 29.) The Company then shipped from Columbus, Ohio, the said boxes of goods and bundles of brooms by the Pennsylvania Railroad to N. L. Rearick, its said agent at Sunbury, Pennsylvania, to be by him delivered to the respective purchasers. Rearick received these goods at Sunbury, and, after cutting apart the several separate orders of brooms, delivered them with the boxes from the Pennsylvania R. R. freight station to the several purchasers, each person receiving the boxes and brooms that were marked with his name and designed to fill his order.

While engaged in delivereing these goods to the several purchasers in the borough of Sunbury, Pennsylvania, on April 14, 1902, Rearick was arrested, charged with violating an ordinance of said borough, making it unlawful to deliver goods by retail, without first having obtained a license so to do. He

was carried before J. P. Carpenter, a justice of the peace, in and for said borough, by whom he was convicted and fined $25.00 and costs for a violation of said ordinance and committed to the jail of Northumberland County until said fine and costs were paid. (Record, p. 26.) (For copy of ordinance, see Record, p. 43.) Rearick then appealed to the Court of Quarter Sessions of Northumberland County, where an "Agreed Statement of Facts" (Record, p. 28, 29, 30, 31 and 32), was submitted to the court for its opinion.

Appeals of his sort are tried *de novo* in the Quarter Sessions Courts of Pennsylvania.

In the Court of Quarter Sessions Rearick filed a written request asking the court to find the following conclusions of law as those governing the questions in controversy in the case (Record, p. 33):

1. All of the acts of the defendant complained of as illegal in this case, and for which he was arrested under the provisions of the ordinance of the borough of Sunbury, approved December 9, 1899, which ordinance is recited in the statement of facts agreed upon, were done in carrying on interstate commerce, and the arrest of the defendant is illegal and void because the ordinance above referred to, so far as it applies to the defendant, is in restraint of interstate commerce and is therefore a violation of Clause 3, Section 8 of Article 1 of the Constitution of the United States, which provides that "Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes."

2. The arrest of the defendant is illegal and void because the ordinance of December 9, 1899, so far as the defendant is concerned, is in restraint of trade. It abridges the right, free-

dom and liberty of contract and for that reason violates Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. The arrest of the defendant is illegal and void because, so far as the defendant is concerned, the ordinance of December 9, 1899, is unconstitutional in that it discriminates between persons and denies the equal protection of the laws. It gives rights, privileges and immunities to some which it denies to others. It is in violation of the last clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides, that, "No state * * * shall deny to any person within its jurisdiction the equal protection of the laws."

Substantially the same claims were made by Rearick orally before the justice of the peace.

The Quarter Sessions Court overruled the request for findings of law (Record, p. 33) and in an opinion (Record, p. 34, 35, 36, 37, 38 and 39) affirmed the judgment of the justice of the peace. Rearick then appealed to the Superior Court of Pennsylvania, sitting at Philadelphia, which court in an opinion (Record, p. 12) affirmed the judgment of the Court of Quarter Sessions, Henderson, J., dissenting. Rearick then filed his petition in the Supreme Court of Pennsylvania (Record, p. 9) praying for leave to appeal to that court, but said court refused to allow an appeal. (Record, p. 10.)

Under the provisions of Sections 709 and 710 of the Revised Statutes of the United States as amended in 1875 (18 Statutes at Large, p. —), the case is brought to this court on writ of error to the Superior Court of Pennsylvania. The said Superior Court being the highest court of law or equity in the State of Pennsylvania in which a judgment in this case can or could be had because of the action of the Supreme Court of that state in refusing to allow an appeal.

The learned Superior and Quarter Sessions Courts (Henderson, J., of the Superior Court dissenting), and the justice of the peace, held, that when Rearick broke the bundles of brooms and delivered therefrom the brooms designed to fill the orders of the persons with whose names they were marked, he was not engaged in inter-state commerce and was therefore amenable to the Sunbury ordinance in question. (Record, p. 19, 38 and 39.) Those courts further held that the ordinance did not violate any right of the plaintiff in error that is guaranteed by the Fourteenth Amendment to the Federal Constitution. To all of which judgments, findings and holdings Rearick duly excepted.

SPECIFICATION OF ERRORS.

The errors into which we conceive the learned Superior Court to have fallen in reaching the conclusions of which we complain consist:

First, in affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing Rearick's first point, which point and the answer thereto are as follows:

"All the acts of the defendant complained of as illegal in this case, and for which he was arrested under the provisions

of the ordinance of the borough of Sunbury, approved December 9, 1899, which ordinance is recited in the statement of facts agreed upon, were done in carrying on inter-state commerce, and the arrest of the defendant is illegal and void because the ordinance above referred to, so far as it applies to the defendant, is in restraint of inter-state commerce and is therefore a violation of Clause 3, Section 8 of Article 1, of the Constitution of the United States, which provides that 'Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes.' "

Answer: "Refused."

Second. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing Rearick's second point, which point and the answer thereto are as follows:

"The arrest of the defendant is illegal and void because the ordinance of December 9, 1899, so far as the defendant is concerned, is in restraint of trade. It abridges the right, freedom and liberty of contract and for that reason violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' "

Answer. "Refused."

Third. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for refusing Rearick's third point, which point and the answer thereto are as follows:

"The arrest of the defendant is illegal and void because, so far as the defendant is concerned, the ordinance of December 9, 1899, is unconstitutional in that it discriminates between persons and denies the equal protection of the laws. It gives rights, privileges and immunities to some which it denies

to others. It is in violation of the last clause of Section 1 of the Constitution of the United States, which provides that 'no state * * * shall deny to any person within its jurisdiction the equal protection of the laws.' "

Answer. "Refused."

Fourth. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for holding that, "Before delivery, therefore, they (referring to the brooms) ceased to be subjects of interstate commerce and became mingled with the common mass of property of the state, and therefore subject to the laws and ordinances of the commonwealth."

Fifth. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for holding, that, while they (the brooms) had in a certain manner been designated at Columbus as property to be delivered to the persons whose names were on the respective tags, and were delivered to the railroad company as a common carrier, yet they remained in the custody and control of the company or their agent, the defendant. The title to the brooms did not pass to the persons who had ordered them until delivered at his house, and they had been inspected and paid for. If the purchasers refused to accept and pay for his purchase the defendant's duty was to return the refused articles to his principal at Columbus. The place of sale therefore of these articles was the borough of Sunbury."

Sixth. In affirming and in not reversing the Court of Quarter Sessions of Northumberland County for affirming and refusing to reverse the judgment of the justice of peace, imposing a fine of $25.00 and costs upon N. L. Rearick, defendant below and plaintiff in error, in this case, and committing said Rearick to the jail of Northumberland County, Pennsylvania, until said fine and costs were paid.

Seventh. In holding that, "the agreement as to the facts would not warrant a finding that the contract was that the goods should be shipped from Columbus by the Supply Company to the purchaser, and if such had been the contract it was not performed according to its terms. These were contracts made in Pennsylvania, to deliver goods at the residences of the purchasers in Pennsylvania. The contracts of sale were, judged by their provisions only, executory contracts relating to commerce within the State of Pennsylvania and were subject to the laws of this state. The performance of the contracts was, therefore, not necessarily concerned with interstate commerce."

Eighth. In holding that, "we are of the opinion that the facts agreed upon as to the delivery of the brooms rendered the transaction subject to state regulation."

Ninth. In holding that "the ordinance in question violates no right of the appellant (Rearick) guaranteed by the Fourteenth Amendment of the Constitution of the United States."

Tenth. In holding that the license ordinance of the borough of Sunbury approved December 9, 1899, did not deny the equal protection of the laws to the appellant (Rearick), by excepting from its operation persons who solicit orders for, or deliver, articles of their own production or manufacture, and persons who sell otherwise than at retail.

Eleventh. In affirming the judgment of the Court of Quarter Sessions of Northumberland County.

Twelfth. In not reversing the judgment of the Court of Quarter Sessions of Northumberland County.

ARGUMENT.

Introductory.

The questions raised on the facts in this case by the plaintiff in error, require the application of certain provisions of the Constitution of the United States for their determination. These provisions are, as pointed out in the specification of errors, the Commerce Clause and Section 1 of the Fourteenth Amendment. The questions presented here are:

1. Under the facts agreed upon was Rearick, the plaintiff in error, engaged in commerce among the states, and, if so engaged, was he amenable to the Sunbury ordinance?

2. Does the ordinance of the borough of Sunbury, Pennsylvania, of December 9, 1899, entitled "an ordinance to provide for the licensing of canvassers," etc., violate the provisions of Section 1 of the Fourteenth Amendment to the Federal Constitution?

We shall consider these questions in their order.

I.

INTER-STATE COMMERCE.

A.

As to the Soliciting of Orders.

IT IS A PRINCIPLE ESTABLISHED BEYOND CONTROVERSY THAT "THE NEGOTIATION OF SALES OF GOODS THAT ARE IN ANOTHER STATE FOR THE PURPOSE OF INTRODUCING THEM INTO THE STATE IN WHICH THE NEGOTIATION IS MADE IS INTER-STATE COMMERCE" AND IS PROTECTED FROM LOCAL INTERFERENCE, BURDENS, OR TAX, BY CLAUSE 3, SECTION 8 OF ARTICLE 1, CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES, THAT, "CONGRESS SHALL HAVE POWER * * * TO REGULATE COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES AND WITH THE INDIAN TRIBES."

It seems unnecessary to go into an extended discussion of this subject—a subject with which this court is very familiar. We shall, therefore, content ourselves with a brief review of the cases bearing thereon and their application to the matters here in controversy.

The leading case that established this doctrine was that of *Robbins* v. *Taxing District of Shelby County*, 120 U. S., 489. That case came to this court on a writ of error to the Supreme Court of Tennessee, which had held valid a statute of that state, by which it was enacted that,

> "All drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling, goods, wares, or merchandise therein

by sample, shall be required to pay to the county trustee the sum of $10.00 per week or $25.00 per month for such privilege."

Robbins, the plaintiff in error, was convicted of having offered for sale by sample, articles of merchandise (stationery) belonging to a firm in Cincinnati without having procured a license. Mr. Justice Bradley, who delivered the opinion of the court, after discussing the fundamental principles that govern inter-state commerce, says:

"In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a *state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein.* Do not such restrictions affect the very foundation of inter-state trade? How is a *manufacturer* or a *merchant* of one state to sell his goods in another state without in some way obtaining orders therefor? In these cases, then, what shall the *merchant* or *manufacturer* do who wishes to sell his goods in another state? Must he sit still in his warehouse and wait for the people of those states to come to him? This would be a silly and ruinous proceeding. The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons *residing* or *doing* business in those other states. But how is the *merchant* or *manufacturer* to secure such orders? If he may be taxed by such state for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon inter-state commerce is to speak at least unadvisedly, and without due attention to the truth of things. It may be suggested that the *merchant* or *manufacturer* has the postoffice at his command and may soloicit orders through the mails. *We do not suppose, however, that anyone would seriously contend that this is the only way in which his business can be transacted without being amenable to exaction on the part of the state.* Besides, why could not the state to which his let-

ter might be sent tax him for soliciting orders in this way as well as in any other way? *The truth is that in numberless instances the most feasible, if not the only practicable way, for the merchant or manufacturer to obtain orders in other states is to obtain them by personal application, either by himself or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase.* But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on inter-state commerce? It seems to be forgotten in argument that the people in this country are citizens of the United States, as well as of the individual states, and that they have some rights under the constitution and laws of the former independent of the latter, and free from any interference or restraint from them.* * * It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. *Inter-state commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the states.* This was decided in the *State Freight Tax Case,* 15 Wall., 232. *The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is inter-state commerce."*

At page 499 of the same report Justice Bradley says:

*"This kind of taxation is usually imposed at the instance and solicitation of domestic dealers as a means of protecting them from foreign competition. * * * But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon*

inter-state commerce, but that it is intended to have that effect is one of its principle objects. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation." (The italics are counsels.)

To the same effect are the cases of *Corson* v. *Maryland*, 120 U. S., 502; *Leloup* v. *Mobile*, 127 U. S., 640; *Asher* v. *Texas*, 128 U. S., 129; *Stoutenburg* v. *Hennick*, 129 U. S., 140; *McCall* v. *California*, 136 U. S., 104, and *Crutcher* v. *Kentucky*, 141 U. S., 47. The question was again before this court in the case of *Brennan* v. *Titusville*, 153 U. S., 289. Mr. Justice Brewer who delivered the opinion of the court in that case, said at page 299:

"The question in this case is whether a manufacturer of goods which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent to another state to solicit orders for the products of his manufactory, without paying to the latter a state tax for the privilege of thus trying to sell his goods.

"It is true, in the present case the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the state can tax for the privilege of selling to one class it can for selling to another or to all. *In either case it is a restriction on the right to sell and a burden on lawful commerce between the citizens of the two states.*

"*It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce.*" (The italics are counsels.)

This question was again before this court in the recent case of *Stockard* v. *Morgan*, 185 U. S., 27. In that case it was held that a tax could not be levied on merchandise brokers whose sole business consisted in soliciting orders from jobbers and wholesale dealers within the State of Tennessee as agents for non-resident parties, firms or corporations. Mr. Justice Peckham delivering the opinion of the court, says, at pages 35 and 37:

> "Although the state has general power to tax individuals and property within its jurisdiction, yet it has no power to tax inter-state commerce, even in the person of a resident of the state. We regard this case as within the Robbins and other similar cases above referred to."

In our case Rearick, the plaintiff in error, was delivering goods to purchasers in the borough of Sunbury, Pennsylvania, that had been shipped to him by his principal, The Citizens' Wholesale Supply Company from the State of Ohio, for that purpose. Orders for the goods had previously been solicited and taken by another agent in the employ of the same company. (Record, p. 28.) These orders were solicited and taken in almost identically the same manner as they were taken in the cases decided by this court and referred to above. The facts in this case, therefore, respecting the soliciting of orders bring it within the rule laid down in those cases.

Porter, J., in delivering the opinion of the court below, said (Record, p. 15):

> "These were contracts, made in Pennsylvania to deliver goods at the residences of the purchasers in Pennsylvania. The contracts of sale were, judged by their provisions only, executory contracts relating to commerce within the State of Pennsylvania, and were subject to the laws of this state. The appellant's principal could have filled these contracts by tendering the delivery of

any goods of the kind and quality of the samples shown, obtained from sources within the State of Pennsylvania; whether the contemplated traffic should go outside the state or not was left to chance or extrinsic business considerations. The performance of the contract was, therefore, not necessarily concerned with inter-state commerce. *Diamond Glue Company* v. *United States Glue Company*, 187 U. S., 611. If the transaction ever came within the protection of the inter-state commerce clause of the federal constitution, it was not because of the inherent covenants of the contract, but from the manner in which those covenants were executed."

It is difficult to understand how the Superior Court could have reached the above conclusion from the facts in the case. The facts show that the orders for the goods delivered by Rearick were solicited and taken in Sunbury by J. S. Kunkle, an agent in the employ of The Citizens' Wholesale Supply Company; that The Citizens' Wholesale Supply Company is a corporation located and doing business in the City of Columbus, Ohio; and that the orders for the goods after being taken were sent by Kunkle to his principal at Columbus, Ohio, (Record, p. 28), at which point the goods were packed to fill the orders and from there shipped to Sunbury, Pennsylvania, to be delivered by its agent, Rearick, to the purchasers in pursuance of the contracts. Each order was directed to The Citizens' Wholesale Supply Company at Columbus, Ohio, (Record, p. 40). Is not such an order an inter-state commerce contract? Was it necessary to have a special provision in the contract to the effect that the goods should be sent from the State of Ohio? This would be absurd. It is safe to say that of all the inter-state commerce that is done in the country, there is scarcely a single provision of the kind to be found in any contract concerning that commerce. Can any-

one point to a single order form of any of the great commercial or publishing houses that contains such a provision?

In this case The Citizens' Wholesale Supply Company had no place of business whatever other than that located in Columbus, Ohio. These orders were taken in Sunbury for goods which were then in the warehouse of The Citizens' Wholesale Supply Company in Columbus, Ohio. This is conclusively proven by the fact that the company upon the receipt of the orders, filled them with goods which were then at its warehouse. For a contract of sale to be a contract involving interstate commerce, it is only necessary that the goods which are sold, are, at the time of sale, in another state, and that they are, by the terms of the contract, to be introduced into the State where the sale is made. This is the rule laid down in the Robbins and other cases *and the facts of this case meet every requirement of this rule.* These contracts of sale were made in Pennsylvania of goods that were then in Ohio and for the purpose of introducing them into the former state from the latter state. In not a single case, similar to this one, that has been before this court or before the Federal Courts or the State Supreme Courts, of which we have any knowledge are the facts different from those in this case on the point discussed. That portion of the Agreed Statement of Facts in this case that relates to the soliciting of orders is almost exactly like the facts in *Brennan* v. *Titusville,* 153 U. S., 289. A comparison of the facts in the two cases will reveal the truth of this statement. How is it possible, then, to have two different rules for facts that are exactly similar? It is evident that the court below overlooked this similarity and thus fell into error.

B.

As to the Delivery—The Transportation.

THE DELIVERY OF GOODS TO A BUYER AT HIS RESIDENCE IN ONE STATE, THAT HAVE BEEN SENT IN PURSUANCE OF CONTRACT BY A SELLER IN ANOTHER STATE, IS INTERSTATE COMMERCE AND SUBJECT TO NO STATE NOR LOCAL BURDENS. THE RIGHT TO SOLICIT ORDERS IMPLIES THE OBLIGATION AND THE RIGHT TO DELIVER THE GOODS IN THE MANNER CALLED FOR BY THE CONTRACTS; AND THE MEANS BY WHICH THE DELIVERY IS MADE CANNOT BE CONTROLLED BY THE STATES.

For making the delivery of these goods to the purchasers, Rearick was arrested for violating an ordinance (Record, p. 24) of Sunbury which made it unlawful for any person or persons to

> "*solicit orders for, sell or deliver at retail,* either on the streets or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, mercandise, or fruits, not of their own manufacture or production, without first obtaining from the Chief Burgess of the borough of Sunbury a license for such purpose."

Rearick was convicted and fined $25 and costs and committed to the jail of Northumberland county for the period of thirty days and until said fine and costs were paid.

It will be seen that this ordinance, as it was applied to this case, was an attempt on the part of the borough of Sunbury, to regulate commerce moving from the seller in the State of Ohio to the purchasers in Pennsylvania. It was an attempt to interpose between the contract of sale and the

delivery of the goods, and to exact a tribute from the seller for the privilege of fulfilling his contract by making delivery of the articles sold. Can this be successfully done when the goods are in course of transportation from one state to their destination in another? To exact a tribute in such case for the privilege of delivering the goods, is equivalent to exacting a tribute for soliciting the orders. It is idle to say that a person may solicit orders free from the dictation of the state, but that the state or its political subdivisions may tax the delivery or prescribe the manner in which it shall be made.

It was said by Mr. Justice Mathews in the case of *Bowman v. R. R. Company*, 125 U. S., 465, 479:

> "It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states."

And quoting with approval the language of Mr. Justice Strong, who delivered the opinion of the court in the case of the *State Freight Tax*, 15 Wall, 232, 275, Mr. Justice Mathews continues:

> "'Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. * * * *It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the states* * * * *nor does it make any difference whether this interchange of commoditiies* is by land or by water. *In either case the bringing of the goods from the seller to the buyer is commerce.*'"

The whole question in this case is decided by the words: "*In either case the bringing of the goods from the seller to*

the buyer is commerce." Rearick was bringing goods from the seller in Ohio to the buyers in Pennsylvania.

In the late case of *Rhodes* v. *Iowa,* 170 U. S., 412, Mr. Justice White, delivering the opinion of the court says, at page 419:

> "The fundamental right which the decision in the Bowman case held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one state into another, from the point of transmission to the point of consignment: *and the accomplishment there of the delivery covered by the contract."* (The italics are counsel's.)

In the *State Freight Tax Case,* 15 Wall, Mr. Justice Strong delivering the opinion of the court, says, at page 276:

> "The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines."

The payment of the license fee required by the Sunbury ordinance was a condition upon which was made to depend the right of the plaintiff in error to deliver these goods. The fee required to be paid was so high that, if the ordinance were enforceable, it would prohibit commerce of this character.

Is it possible that the borough of Sunbury can regulate interstate commerce in such manner? The answer to this ques-

tion is contained in the opinion in the case of *Rhodes* v. *Iowa*, supra, to which we shall again refer briefly. In that case it was expressly held that merchandise is protected while in the course of transportation from the point of transmission in one state to the point of consignment in another, "*and the accomplishment there of the delivery covered by the contract.*" In this case the contracts called for the delivery of the goods at the residence of the purchasers. (Record, p. 30.) Was not the plaintiff in error engaged in accomplishing the transportation of this merchandise as called for by the contracts and was he not protected while so doing?

The Manner in Which Interstate Commerce is Transported Cannot be Controlled by the States.

In this case a number of brooms to fill orders were tied in bundles "solely for convenience in shipment" (Record, p. 29) and when they arrived in Sunbury from Columbus, Ohio, they were received by the agent of the vender, the plaintiff in error, who cut them apart and delivered them to the purchasers as per tag on the handle or handles; each purchaser receiving the broom or brooms that had been selected by the vender in Columbus to fill his order. (Record, p. 31.)

The court below held, in substance, respecting the foregoing facts, that the delivery of the brooms by Rearick, after they had been cut apart, was subject to regulation by the laws of Pennsylvania and by this ordinance of Sunbury; that when the twine that bound the brooms together in bundles was cut, the brooms became mixed with the general mass of property in Pennsylvania, and, were, therefore, subject to the laws of that state and to the Sunbury ordinance. Did the cutting of the brooms apart render the subsequent transaction

of delivering them to the purchasers subject to the provisions of the ordinance? This is one of the chief questions in controversy in this case.

These brooms, with other goods, came into Pennsylvania from Ohio, in pursuance of contracts of sale with various individuals in Sunbury. They never became a stock in trade nor the part of a stock in trade in Pennsylvania. They were shipped into that state *from Ohio, solely for the purpose of being delivered to the persons who had previously ordered them.* (Record, p. 31.) *Each was marked with the name of its purchaser.* The breaking of the bundles and the subsequent delivery of the brooms did not work a violation of the ordinance. They had not yet reached the destination called for by the contracts, viz, the residences of the purchasers. The plaintiff in error was engaged in carrying them to their destination when arrested, *charged with the very act of moving the goods to their ultimate places of rest in Pennsylvania.* This is not a case that has anything to do with original packages. These goods did not come into Pennsylvania to be sold or offered for sale; they had already been sold while they were in the State of Ohio, and were on their way from the latter state to complete those sales. The *purchasers were the importers.* The "brooms were in Sunbury for no other purpose than to fill their orders." Record, pp. 31 and 32.)

The delivery was a portion of the transportation, and beyond the power of the borough to control. The court below held, respecting separate boxes of goods, that they were free from regulation.

The boxes and brooms were in Sunbury for the same purpose. To say that no license is required if goods are delivered in a certain manner, but if delivered otherwise a license must first be procured, is surely a regulation of commerce.

Let us see where the doctrine of the court below respecting this point would lead. Were it sustained, the states could regulate the manner of packing, marking and transporting all goods that enter its borders from other states. They could prescribe such onerous regulations with respect thereto that there could no longer be an interchange of commodities among the states. But they cannot regulate these matters. For them to do so would be to regulate the transportation of interstate commerce which is within the exclusive control of Congress.

Mr. Justice Field, delivering the opinion of this court in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, said at page 203:

> *"The means of transportation of persons and freight between the states does not change the character of the business as one of commerce, nor the time within which the distance between the states may be traversed."*
>
> *"The power of Congress to regulate commerce, also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."*

This is an exclusive power in Congress. If, then, the borough cannot regulate the manner in which merchandise involved in interstate commerce shall be shipped, how is it possible for it to require that a seller in another state shall transmit goods to buyers in the borough by common carrier? Is it not manifest that such a requirement would be a regulation of commerce?

If a seller desires to ship from one state to another state, several packages of goods in the same box to fill the orders of different persons, he may do so, and, upon the arrival of the box at its destination, he or his agent may assort the pack-

ages and deliver the same to the respective purchasers. Such a method of shipment and delivery, when the goods pass from one state to another, "*is a means of transportation over which the states have no control.*"

A case precisely in point with this one was that of Caldwell v. North Carolina, 187 U. S., 622. That case clearly and unequivocally establishes the principles above referred to and supplies the rule by which the case at bar must be decided. The case of *Caldwell* v. *North Carolina* reached this court on a writ of error to the Supreme Court of North Carolina, which court had held valid an ordinance of the city of Greensboro by which it was enacted, that

> "every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year."

The ordinance made it an offense to engage in said business without first procuring a license.

The facts in that case were as follows:

> "The defendant, Caldwell, being employed by the Chicago Portrait Company of Chicago, Illinois, went to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employes of the Chicago Portrait Company, who had preceded the defendant in Greensboro. The defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, N. C., addressed to the Chicago Portrait Company, carried these packages to his rooms in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames, and from this point de-

livered the pictures, one at a time, to the purchasers in the city of Greensboro. The defendant had paid the city no license tax and had been engaged in this work two days when arrested."

In delivering the opinion of this court Mr. Justice Shiras said, at page 630:

"The State Supreme Court endeavored to distinguish the present case from that of Brennan v. Titusville in the following observations:

" 'The defendant insists that Brennan v. Titusville is directly in point—is in every essential fact, this case—and should control the opinion of the court on appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case the goods were shipped directly to the purchaser. In this case the goods were shipped by the Chicago Portrait Company to itself in the city of Greensboro; and when they reached Greensboro the defendant, as the agent of the Chicago company, received them from the railroad at its depot, carried them to its room in Greensboro, opened the boxes in which they were shipped, took out the pictures and frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of Brennan v. Titusville, and we should so hold as it was held there that it was an interference with Interstate Commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract. If they had been completed in Chicago and under contract shipped to the purchasers, the title would have passed to the consignee upon delivery to the railroad in Chicago, the railroad being deemed to be the agent of the consignee and Brennan v. Titusville would have applied, as the tax would then have been upon the commerce. But instead of completing the pictures in Chicago and

shipping them to the parties who had contracted for them, they were shipped to themselves, the Chicago Portrait Company, in Greensboro. This being so, no title ever passed from the Chicago Portrait Company until the pictures were put in their frames and delivered by the defendant. These pictures belonged to the Chicago company when they were shipped from Chicago, and belonged to it when they got to Greensboro, and the question is, could the Chicago company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax for which its own citizens would be ilable? It seems to us that it could not.' "

Mr. Justice Shiras, after quoting the foregoing from the opinion of the Supreme Court of North Carolina, said:

"We are not persuaded by this reasoning. It seems to proceed from two propositions: first, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the sender in Greensboro. But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vender out of the state or the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the puchasers, whether in the same or separate packages, such a transaction would beyond question be interstate commerce beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete condition of articles of commerce if shipped directly to the purchaser cannot subject them to the license tax. But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and placing the pictures in their proper places (the language of the verdict)

meant that each picture was placed in the frame designed for it.

"*Nor does the fact that the articles were not shipped separately, and directly to each individual purchaser, but were sent to an agent of the vender at Greensboro, who delivered them to the purchaser, deprive the transaction of its character as interstate commerce. It was only that the vender used two instead of one agency in the delivery. It would be evident that, if the vender had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vender himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent, who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate.*" (The italics are counsels.)

"Transactions between manufacturing companies in one state, through agents, with citizens of another constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser are free from state taxation, but if sent to an agent to deliver are taxable, through a license upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the constitution."

It will be seen from the foregoing opinion that this court has held that it is not necessary to ship "articles separately and directly to each individual purchaser," but that they may be shipped in bulk to an agent of the vender, and he may deliver them without being amenable to the state; and that such a means of shipment and delivery "does not deprive the transaction of its character as interstate commerce."

The Sunbury ordinance here in question requires a license for the *delivery* of the goods just as the Greensboro ordi-

nance required a license for the delivery of the pictures and frames. There is no difference between the ordinances in the two cases, except that the Sunbury ordinance requires a much more unreasonable sum to be paid for a license, and makes arbitrary and unjust discriminations, while the Greensboro ordinance makes no discriminations whatever. In the Caldwell case the articles were shipped from the vender at Chicago to itself at Greensboro, N. C., and were delivered by its agent. In this case the articles were shipped from the vender at Columbus to its agent at Sunbury, and he delivered them. The agent in the Caldwell case broke the packages, put the pictures and frames properly together, and delivered them. Here the plaintiff in error broke the bundles and delivered the brooms, with the other goods to the purchasers.

It will be seen that the Caldwell case is perfectly in point with this one and the rule there laid down is the rule for this case. In view of this and other decisions of this court, it seems idle to argue this question further, but we wish to call the court's attention to a few cases prior to the decision in Caldwell case, and which are in point with the case at bar.

Judge Bond of the United States Circuit Court for the Eastern District of North Carolina, in the habeas corpus case of in re Spain, 47 Fed. Rep., 208, held where the venders at Charleston, West Va., shipped goods in bulk to their agents at Raleigh, North Carolina, for delivery to fill orders previously taken, and the agents upon the arrival of the goods, broke the bulk and delivered the goods to the purchasers, that there was no difference between such a case and the case of Robbins v. Taxing District, supra. He further held, that:

> *"We are of the opinion that under the decision of the Supreme Court this property did not become taxable in North Carolina until it reached the purchaser. It is idle*

to say that as the Supreme Court does in the case quoted, that a non-resident may send drummers or persons to solicit sales in a sister state, but that the state may tax him for making delivery of the goods sold. If these goods which petitioner sold in North Carolina had been placed in charge of an express company, packed in boxes, with directions to open the boxes at point of consignment and to deliver to the parties whose names were on a descriptive book the several articles set down thereon to them as purchasers, would the express company have been a peddler? The right to sell implies the obligation and right to deliver. It is as much interstate commerce to do the one as the other."

The same question came before Judge Reed of the United States Circuit Court for the Western District of Pennsylvania in the habeas corpus cases of *in re Nichols*, 48 Fed. Rep., 164, and *in re Tyerman*, 48 Fed. Rep., 187. In the former case, Nichols solicited orders for books in Titusville, Pa., for P. F. Collier & Co. of New York. In the latter case, Tyerman delivered the books to fill the orders previously taken by Nichols, and collected the price therefor. Both were discharged by Judge Reed, who quoted from the opinion of Judge Bond in the Spain case, supra, with approval, and added in the Tyerman case:

> "There is no difference in principle between the two cases, this petitioner being engaged in completing sales made by Mr. Nichols, and therefore engaged in interstate commerce."

In the case of *Huntington* v. *Mahan*, 142 Ind., 695, a case precisely similar to the Tyerman case, supra, the Supreme Court of Indiana held that the city of Huntington could not levy a license tax on any agent delivering books that had been sent from New York to fill orders previously taken. The Supreme Court of Louisiana in the case of *Tax Collector*

v. *Pettigrew*, 44 La., 356, came to the same conclusion in a clock case. The court in deciding the case, said:

> "The clocks were shipped (from New York) to convenient points for delivery to the purchasers by the defendant's agents. After the orders were obtained the clocks were in fact shipped directly to the purchasers. *The fact that their agent received and delivered them cannot so locate them in the state as to make them a part of the general mass of the property subject to taxation. They became so when delivered to the purchasers.*"

In the case of *State* v. *Willingham*, 62 Pac. Rep., 797, a Wyoming case, the Supreme Court of that state reached the same conclusion in a case where an agent of the Chicago Portrait Company was delivering pictures and frames. The court held, that,

> "The delivery of the articles to the persons ordering them did not constitute a sale by the agent making the delivery, but * * * was only one of the steps taken by the Chicago Company in the performance of its contract. They were still the subjects of interstate commerce, and the arrest of the agent was not authorized by law."

Since the decision in the Caldwell case, supra, the Supreme Court of Georgia in the case of *Stone* v. *State*, 117 Ga., 291, held to the same effect, as did also the Supreme Court of Nebraska in the case of *Menke* v. *State*, 97 Northwestern Rep., 1020. Those two cases are almost precisely similar to the case at bar, the defendants having been arrested for delivering goods without license. In both of those cases it was held that the defendants were not required to take out license for the reason that they were engaged in interstate commerce.

The decision in the case of *Caldwell* v. *North Carolina* was affirmed by this court in the late cases of the *N. & W. R. R. Co.* v. *Sims*, 191 U. S., 441; and the *American Express Co.*

v. *Iowa*, 196 U. S., 133. It was held in those cases, that the "C. O. D." business, as usually carried on through the agency of common carriers like railroad and express companies, was interstate commerce.

The business done by The Citizens' Wholesale Supply Company through the plaintiff in error in this case, was a "C. O. D." business, the vender employing a private agent, Rearick, in the delivery instead of a common, public agent like an express company. This is not an unusual method of transporting and delivering articles of commerce. Fruit trees are almost universally sold by agents who solicit orders for them by going from house to house or place to place. When the nurseryman receives the orders he selects the trees to fill each order, binds them together and tags them with the name of the purchaser. He then aggregates together the several bundles of trees, packs them in a large box or boxes and ships them to his agent for delivery to the purchasers. The agent receives the box, opens it and delivers to each purchaser the trees marked with his name and collects the contract price therefor. Books are sold and delivered in the same manner. Magazines and newspapers are likewise tied in bundles and transported and delivered to subscribers. Sometimes this is done through the agency of the postoffice. Sometimes a private agent is employed to make the distribution. It is also a custom of commerce for the vender to pack several packages of goods for different purchasers in one or more boxes and consign them to one of the purchasers or to a transfer company for distribution. The consignee upon the receipt of the boxes, breaks the bulk and delivers the several packages to the respective purchasers.

When commerce of this character passes from one state for delivery in another state, would the manner of delivery deprive the transaction of the protection of the commerce clause of the Constitution? The rule in such case that governs the delivery of "*pictures and frames*" is the rule that governs the delivery of fruit trees, books, magazines, newspapers, other merchandise and *brooms*

For this court to hold with the court below that the manner employed in the delivery of the brooms was not interstate commerce, would be to seriously cripple the business of The Citizen's Wholesale Supply Company with its customers in other states than Ohio. It would likewise have the same effect on the business of the great publishing houses, the nurserymen and the many other persons, firms and corporations that do business in precisely the same manner.

It is well known that these license taxes are for the very purpose of creating a monopoly in local dealers by hampering or destroying outside competition. A holding by this court that business like that done by the plaintiff in error is not interstate commerce would be to open the door for state interference with it. The local tradesmen would immediately instigate such interference and the result would be that a large portion of commerce would be completely destroyed. The people would thus be placed at the mercy of the dealers. Such a holding would further result in the adoption of a policy of protection and retaliation by the states that would bring about again the condition that existed under the articles of confederation. Instead of the union and good feeling that now exists among the states we would have dissension and discord which it was the great purpose of the Constitution to avoid.

But this court has fortunately held, whenever the question has been raised, that Congress has exclusive control over the transportation, purchase, sale and exchange of commodities in interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat., 1; *State Freight Tax Case*, 15 Wall, 232, 279; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S., 196, 203; *Robbins* v. *Shelby County Taxing District*, 120 U. S., 489; *Bowman* v. *R. R. Co.*, 125 U. S., 465.

The truth of the foregoing proposition is shown in the Caldwell case, supra, and the late "C. O. D." cases. In the "C. O. D." cases (American Express Co. v. Iowa and Adams Express Co. v. Iowa), 196 U. S., 133, this court, by Mr. Justice White, said:

> "When it is considered that the necessary results of the ruling below was to hold that wherever merchandise shipped from one state to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions

> essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

The foregoing quotation from the opinion of Mr. Justice White embodies a rule of law that covers completely all the interstate commerce questions involved in this case and is decisive of those questions.

The learned court below held that the facts of this case did not bring it within the rule laid down in *Caldwell* v. *North Carolina,* supra, for the following reasons which we quote from the opinion of that court. (Record, p. 17.)

> "The contract in that case (the Caldwell case) was for the making of specific articles, to be made in Illinois, and delivered to the purchaser in North Carolina. The party who contracts for a picture and a frame designed for it, or a piece of machinery of a peculiar design, to be made by a certain person or manufacturer in another state, contracts for the skill of that particular artist or maker, and the tender of an article of the same general character, originating from any other source would not make a compliance with the terms of the contract. If the contract is to be performed according to its terms the article must be made in one state and sent into another. This necessarily involves interstate commerce. The pictures and frames were made in Chicago, presumably by the persons for whose skill the purchasers had contracted, and were delivered in Greensboro, North Carolina, in literal compliance with the contract."

A reference to the opinion in the Caldwell case will show how absurd is the reasoning of the court below in respect to the above propositions. There is not one word in that case that would justify those conclusions. Is there anything in the Caldwell case to show that the purchasers of the "pictures and frames" contracted for the special skill of any person or persons in the making of the pictures and frames or that the

decision in that case hinged on any such question? If there is we have been unable to find it. There is nothing whatever said in the Caldwell case that conveys the slightest intimation on which to base a holding that this case is different from that on account of the difference in the character of the goods.

We are unable to discover either from the facts or the opinion what kind of pictures and frames were there involved or that the Chicago Portrait Company was the manufacturer of either the pictures or the frames. The word "designed" as used by Mr. Justice Shiras plainly means "intended." He uses the two words interchangeably as will be seen by a reference to his opinion. Not only is there no ground for the distinction attempted to be drawn by the court below, but it is manifest that this court never intended to construe the commerce clause of the Constitution as giving to "pictures and frames" greater rights than it does to other legitimate articles of commerce.

The point on which the court below distinguished this case from the Caldwell case would, were it sustained, operate to the same effect against *"Stationery," "Tea," "Sewing Machines," "Whiskey,"* and every other article of commerce that has been involved in one way or another in cases decided by this court. To say that brooms are not articles of commerce is to place them below "Whiskey" and "Beer," which have been repeatedly held by this court to be legitimate articles of commerce. *Leisy* v. *Hardin,* 135 U. S., 100. Under the theory of the court below every article imported into one state from another state and delivered in the manner employed in the Caldwell case and the "C. O. D." cases would have to be manufactured or produced by persons for whose

skill the purchaser especially contracts. The imagination will readily picture some very ridiculous results to which such a doctrine would lead.

The learned court below showed much confusion in deciding this case. We never claimed that the individual brooms were "original packages" and therefore entitled to protection on that ground, as that court indicates in its opinion, (Record, p. 18). On the other hand, we claimed that the shipment of the brooms in the manner employed was only for convenience in transportation and the doctrine of "original packages" was not involved; that the brooms were not brought into Pennsylvania to be put up for sale, but to be delivered to purchasers in pursuance of contracts of sale previously made.

The court below refers to the case of *Austin* v. *Tennessee*, 179 U. S., 343, to support its theory of "original packages." The facts in that case are so completely different from the facts here, that it is needless to discuss the question. We simply say that in that case cigarettes were put on sale by a dealer, after the boxes containing them had been delivered to him in a large basket by an express company. The question involved was not the question of transportation, but of whether the cigarette boxes were "original packages" and protected until after a sale had taken place.

Our position on this point is fully sustained by the decision of this court in the case of Caldwell v. North Carolina, infra, and other cases. The distinction between this case and the Austin case is clear. It is plain that the Superior Court erred and that the reasoning by which that court reached the above conclusions is purely artificial.

The States Cannot Invoke Their Police Power for the Purpose of Regulating Commerce Among the States That is National in its Character.

It was strongly urged in the court below by the counsel for the Commonwealth that the Sunbury ordinance was a police regulation, and, therefore, within the power of the borough, under the authority of the state, to enforce, even as against interstate commerce. The court below sustained the claim of the Commonwealth that this ordinance was a police regulation, but did not sustain the claim that it could be enforced against interstate commerce. It held in effect that it could be enforced against the business of the plaintiff in error because that business was not interstate commerce, but the domestic commerce of Pennsylvania and therefore subject to its laws and ordinances.

As to the nature of this ordinance the court below said, (Record, p. 12):

> "The authority of the borough to require persons canvassing from house to house and upon the streets, for the purpose of selling goods at retail, or delivering goods in pursuance of orders obtained by such canvassing, to take out a license, and to impose a penalty for the violation of such an ordinance is within the *police power* delegated by the general borough law of April 13, 1851, P. L. 320; *Borough of Warren* v. *Geer,* 117 Pa., 207; *North Wales Borough* v. *Brownbach,* 10 Pa. Superior Ct., 227; *North Wales Borough* v. *Brownbach,* 194 Pa., 609; *Mechanicsburg Borough* v. *Koons,* 10 Pa. Superior Ct., 131."

In the case of Titusville v. Brennan,—Pa. St.—the Supreme Court of Pennsylvania *held in the most positive terms* that

the ordinance there in question was a police regulation and the commerce was subject to its control.

That decision of the Supreme Court of Pennsylvania was reversed by this court in the case of *Brennan* v. *Titusville,* 153 U. S., 289. This court, in that case, discusses the question of whether or not the ordinance was a police regulation, holding, that it was a license for general revenue purposes within its very declarations. This court, however, regarded that question as of no importance as bearing on the case. Mr. Justice Brewer in that case at page 298 said:

> "*Even if those declarations had been the reverse, and the license in terms been exacted as a police regulation, that would not conclude this question, for whatever the reason given to justify, or the power involved to sustain the acts of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained.*" * * * "*Thus in, New Orleans Gas Company* v. *Louisiana Light and Heat Producing and Mfg. Co.,* 115 U. S., 650, 661, this court by Mr. Justice Harlan said: 'Definitions of the police power must, however, be taken subject to the condition that the state cannot in its exercise for any purpose whatever, encroach upon the powers of the general government, or the rights granted or secured by the supreme law of the land.'
>
> "In *Henderson* against *Mayor of New York,* 92 U. S., 250, the court speaking by Mr. Justice Miller said: * * * 'that no definition of the police power and no urgency for its use can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the discretion of congress by the constitution.'
>
> "And in *Railroad Company* v. *Husen,* 95 U. S., 465, Mr. Justice Strong, delivering the opinion of the court, said: " 'Under color of it,' " the police power, 'objects not within its scope cannot be secured at the expense of the protection afforded by the Federal constitution.'
>
> "In *Walling* v. *Michigan,* 116 U. S., 446, 460, in the opinion delivered by Mr. Justice Bradley it was said:

'The police power cannot be set up to control inhibitions of the Federal constitution or the power of the United States government created thereby.' "

Continuing, Mr. Justice Brewer said:

"We think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon inter-state commerce can be imposed by the state without the assent of congress, and the silence of congress in respect to any matter of inter-state commerce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a burden upon inter-state commerce is not open to question." (Italics are counsels.)

As was suggested in the Titusville case, it must be borne in mind that the goods delivered by Rearick were legitimate subjects of commerce. There is no charge that they were in any manner injurious to the health or general welfare of the community. "The ordinance is not one designed to protect from imposition minors, habitual drunkards, or persons under any other affliction of disability. There is no discrimination except between manufacturers and licensed merchants on the one hand and the rest of the community on the other. *Unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants, it cannot be for the privilege of selling to the rest of the community."* (*Brennan* v. *Titusville*, 153 U. S., 289, 298.) Nor is there any provision in the ordinance for the inspection of goods offered for sale or delivery to determine their character as unwholesome or deleterious.

A comparison of the ordinance under which Rearick was arrested with the Titusville ordinance discussed above, will reveal the fact that they are almost identical in their provisions except that this ordinance does not state that it is for general

revenue purposes. Sections 12 and 18 of the Titusville ordinance are for all purposes like the Sunbury ordinance here in question. Whether regarded as a tax or a police regulation, the one is as impotent as the other to regulate commerce among the states. The holding of this court respecting the Titusville ordinance is applicable in the fullest sense to this Sunbury ordinance as applied to the facts of this case. We have established beyond any possibility of equivocation that the plaintiff in error, when he delivered the goods in Sunbury, was engaged in inter-state commerce. *The ordinance therefore was a direct burden upon inter-state commerce, for it required payment for the privilege of exercising two of the constituents of commerce—the sale and the transportation of goods. In whatever light it may be regarded it is void as being a direct burden upon that commerce.* The numerous authorities cited heretofore have fully established this doctrine.

We believe that we have now disposed of all the questions raised upon the commerce feature of this case and have shown conclusively, both by reason and authority, that the business of the plaintiff in error, as appears by the facts, was inter-state commerce and free from local interference, burdens or tax.

It remains for us to show that this Sunbury ordinance is a denial of the equal protection of the laws and is therefore in violation of the Fourteenth Amendment to the Federal Constitution. It is therefore not law and a conviction under it cannot be sustained in any case.

II.

THE ORDINANCE IN QUESTION IS UNCONSTITUTIONAL AND VOID FOR THE REASON THAT IT DISCRIMINATES BETWEEN PERSONS AND DENIES THE EQUAL PROTECTION OF THE LAWS. IT GIVES RIGHTS, PRIVILEGES AND IMMUNITIES TO SOME WHICH IT DENIES TO OTHERS. IT IS IN VIOLATION OF THE LAST CLAUSE OF SECTION 1, FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES, THAT, "NO STATE * * * SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

A.

As to the Discrimination in Favor of the Producer and Manufacturer.

It will be seen that the Sunbury ordinance (Record, p. 24), makes a special exemption in favor of the producer, and manufacturer. They are by an express provision of the ordinance taken out from its general terms, and excepted from its operation. They are placed in a favored class. They are not required to procure a license to sell or deliver their goods, nor are they subject to any penalty for selling or delivering them in any manner they choose. Persons who are not producers nor manufacturers, if they would "solicit orders for their goods at retail" or "deliver them at retail," by going from house to house in the borough of Sunbury, must, by the terms of the ordinance, first procure a license for the privilege, and, on failure to do so, be subject to the prescribed penalty. The producer or manufacturer may deliver the same kind of goods that the non-producer or non-manufacturer delivers;

the former need not take out a license, the latter must. Has the former class greater civil or personal rights than the latter under the constitution so that the borough may legally discriminate in favor of the one and against the other? Deprive one person of his liberty and property for doing precisely the same thing that another may do without suffering any penalty whatever. It is claimed that this is a police regulation for the protection of the inhabitants of the borough. Can police regulations validly discriminate in such manner? No valid police regulation may discriminate in the manner in which the Sunbury ordinance does. It would be the grossest inequality and the most flagrant denial of the equal protection of the laws to imprison one person for doing the same thing that is no offense if done by another. No reason can justify such an invasion of the rights of the persons against whom this ordinance is directed.

Police regulations for the protection of the community must, to be valid, be expressed in general terms. Where an exception is made of a person or class of persons, as is done by this ordinance there is no protection for the community. Can it be assumed that the producer or manufacturer is more honest than one who does not manufacture or produce the article which he sells? It would be as reasonable to except them from laws against theft or other crime. If this Sunbury ordinance is a police measure for the protection of the inhabitants of that borough it cannot draw a distinction between producers and non-producers, manufacturers and non-manufacturers, 'for the distinction would have no relation to the purpose of such an ordinance, which is the protection of the public. To accomplish this end it is just as essential that the manufacturers and producers be required to take out a license as any other

member of the community.' (*State* v. *Whitcomb,* infra.) A statute of Wisconsin that made similar discriminations was before the Supreme Court of that state in the recent case of *State* v. *Whitcomb,* 99 Northwestern Rep., 468. Justice Dodge delivering the opinion of the court in that case said at page 471:

> "Again what possible reason, revenue, or police can justify discrimination between the farmer or mechanic whose goods were purchased three months earlier and one who offers to the community newly purchased goods of the same kind? *Is one more honest than the other? If so, which? Is one* more of an expense to protect against? Is either more certain than the other to have otherwise contributed to the public revenues, or better able to contribute? These questions admit of none but negative answers. Is the wooden nutmeg any less meretricious because the man who brings it here and peddles it is hired by the Connecticut mechanic of whose lathe it is the fruit than if the same man were employed by the mechanic's next door neighbor, a merchant? *State* v. *Wagner,* 69 Minn., 205; *McRoberts* v. *Sullivan,* 67 Ill. App., 435. Clearly, such classification as this cannot have sprung from any general public purpose, nor germane to any. *It is not equal protection of the laws to all people similarly situated with reference to that law."*
>
> "Another glaring false classification is presented by the exemption of dealers in agriculture implements maintaining permanent places of business, or keepers of retail meat markets, or fish dealers, and sellers of fruits and vegetables in cities of the first class, selling their respective wares. What consideration of public welfare could exclude a retail grocer from peddling his wares, while permitting the keeper of an adjoining meat market to peddle perhaps the same articles, or exempt the dealer in plows from the restriction placed on the dealer in paints, fence wire, or any other merchandise, we confess our inability to discover. Under this act the agent of this appellant's employer and an agent of the keeper of a nearby meat market may start together on the same vehicle, each with

his samples—tea, coffee, sugar, in one satchel, ham, bacon, cured meats, and lard in the other; may visit the same farmer in the same vehicle, one take an order for coffee and sugar, the other for lard and bacon. The first is a criminal, the other not. The illustration leaves nothing to be said. It is discrimination between individuals of the same class, not between legitimate classes."

In the case of *State* v. *Wegner*, 69 Minn., 205, a license statute making similar discriminations to this ordinance was before the Supreme Court of Minnesota. The case did not involve the question of whether the statute violated the Fourteenth Amendment but whether it violated a similar provision of the constitution of Minnesota, which was equivalent to the same thing.

In delivering the opinion of the court in that case, Canty, J., said:

"This court has often held that, under these sections, the legislature must treat alike all who are in the same condition, must make the law apply to a whole class, and cannot make a law which applies only to a part of a class. And the class must be selected on some distinction, or be defined by some principle, which might naturally or properly distinguish it from all other classes. We are of the opinion that these rules have not been complied with in the framing of this statute. * * *

"Thus, the manufacturer is allowed, by himself and his employe, to peddle without license the wares of his own manufacture. The legislature can regulate the business of hawkers or peddlers only for the purpose of preventing it from becoming a nuisance. The business is inherently moral and legitimate in itself, but there is in it a tendency to abuse, as many irresponsible, clamorous and intrusive persons engaged in it. It cannot be held, on any sound principle, that peddling may not become a nuisance as when the peddler or his employer has manufactured the wares he peddles, as when some one else has manufactured them. This act allows the manufacturer of brooms, tinware, patent medicines, or any other articles, whether

manufactured in this state or elsewhere to employ the most obstreperous and irresponsible peddlers to hawk his wares for him without license, while no peddler can buy the same goods from the manufacturer and peddle them on his own account without a license. For the purpose of a law to prevent peddling from becoming a nuisance, we cannot on any proper basis of classification, distinguish between the peddling of goods by the manufacturer and his servant, and the peddling of the same goods by the purchaser from the manufacturer. Thus, when the object of a law was to prohibit the nuisance arising from the emitting of dense smoke from chimneys, the law was held unconstitutional, because it excepted from the operation of the act the chimneys of manufacturing establishments. *State* v. *Sheriff*, 48 Minn., 239. The distinction was held to be arbitrary and the classification improper. In the same manner as the act here in question attempts to distinguish between peddling by the manufacutrer and his servant and peddling by the purchaser from the manufacturer, it attempts to distinguish between peddling by the farmer or nurseryman and peddling by the purchaser from such farmer or nurseryman; between peddling by the butcher and peddling by the purchaser from the butcher. These distinctions are arbitrary and no proper basis for classification. This disposes of the case. The act in question is unconstitutional, and the conviction under it is illegal and void."

The reasoning of the Supreme Courts of Wisconsin and Minnesota, in the cases from which we have just quoted has especial application to the Sunbury ordinance.

In the case of Flatau v. Mansfield, 14 Ohio C. C., 596, Adams, J., said:

"Under this act, and we must judge this act by its terms as they appear upon the statute books, two dealers in the same line of goods, in the same town and on the the same street, may have stores that in all respects, are identical in the character of their fixtures, the character of the stock of goods that they are selling, and they may be selling in exactly the same manner; both of them may

> be citizens of the same town, one of them a permanent dealer in the business who has been carrying on business for many years, and the other, perhaps, a wholesale dealer, who has taken a stock of goods to secure a debt, and is anxious to dispose of this stock and get his money. Under this law, one man is free from any license fee or tax, and the other can be required to pay any sum that the council of the city or village may deem expedient. The Statement of that case to an unprejudiced mind in a free country shocks the sense of justice, but that is not sufficient to make the law unconstitutional."

Adams, J., then quoted from Section 2 of the Bill of Rights of the Ohio Constitution, and said:

> "That is all I care to read from that section. 'Government is instituted for their equal protection and benefit.' We think this section of the statute clearly violates the principles stated in the Bill of Rights that all laws must be for the equal protection and benefit of the people."

The Supreme Court of Ohio held the same statute unconstitutional in the case of *Newark* v. *Flatau*, Supreme Court Decisions, Unreported Cases, 372 (53 O. St., 660). The reasoning of the Ohio Circuit Court above quoted is especially applicable to this ordinance. There have been a number of cases decided by other circuit courts in Ohio that have involved precisely the same questions as we are now discussing and those courts have uniformly held that discriminations in an ordinance, like those made by the Sunbury ordinance, render it unconstitutional and void because denying the equal protection of the laws. *Cadiz* v. *Marshall*, Harrison County Circuit Court, unreported; Warsaw v. Green, Coshocton County Circuit Court, unreported.

At this point we wish to call the court's attention to the case of Conolly v. Union Sewer Pipe Company, 184 U. S.,

540. In that case the question of the validity of an act of the legislature of Illinois, known as the "Anti-Trust Act," was involved. That act prohibited the combination of capital, skill or acts and made it a penalty to violate the same.

The act further declared illegal and unenforceable any contract which might be made by such combinations. Section 99 of the act made this provision:

> *"The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."*

The Union Sewer Pipe Company, an Ohio corporation, brought an action to recover from the defendant, Thomas Connolly, on two promissory notes, given on account of the purchase of Akron pipe from the plaintiff. The defendant, among other defenses, pleaded the Anti-Trust Act of Illinois as a defense to the action. The case came to this court on error from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice Harlan in delivering the opinion of the court says, at pages 558, 559 and 560:

> "But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.
>
> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which as often stated by this court, were not included in the grants of power to the general government and therefore were reserved to the states, when the constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state even

when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden,* 9 Wheat 1, 210; *Suinot* v. *Davenport,* 22 How., 227, 243; *Missouri, K. & T. R. R. Co.* v. *Haber,* 169 U. S., 613, 626.

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *Missouri* v. *Lewis,* 101 U. S., 22, 31." "We have also said: The Fourteenth Amendment, in declaring 'that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances, *in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property;* that they should have like access to the courts of the

country for the protection of their persons and property; the prevention and redress of wrong, and the *enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions,* and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as prescribed to all for like offenses.' *Barbier* v. *Connolly,* 113 U. S., 27. This language was cited with approval in *Yick Wo.* v. *Hopkins,* 118 U. S., 356, 369, in which it was also said that, 'The equal protection of the laws is a pledge of protection of equal laws.' In *Hayes* v. *Missouri,* 120 U. S., 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the object to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and conditions both in the privileges conferred, and in the liabilities imposed.' 'Due process of law and the equal protection of the laws,' this court has said 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the power of government.' *Duncan* v. *Missouri,* 152 U. S., 377, 382.

"Many other cases in this court are to like effect. These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all except producers* of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statutes and may combine and do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of the state agriculturalists and raisers of live stock, are all in the same general class, that is, *that they are all alike engaged in domestic trade which is, of right open to all,* subject to such regulations, applicable alike to all in like

conditions, as the state may legally prescribe. The difficulty is not met by saying that, generally speaking, the state in enacting laws may in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis, * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, * * * some difference which bears a just and proper relation to the attempted classification,—and not a mere arbitrary selection.' "

After discussing some cases in which a classification has been made for taxation purposes, Justice Harlan goes on to say:

> *"It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce, such a statute is not a legitimate exercise of the power of classification, rests upon no reasonable basis, is purely arbitrary and plainly denies the equal protection of the laws to those against whom it discriminates."* (The italics are counsels.)

This court also held that since the legislature had exempted one class it could not be presumed that it would have passed

the act otherwise, and therefore the whole act must fail. The learned court below said (Record, p. 19):

> "All who sell by canvassing and delivering from house to house, articles, "Not of their own production or manufacture are required to procure a license, manufacturers and producers are only excepted so long as their sales are confined to the articles produced by them, when such persons attempt to sell articles produced by others they must, under the provisions of this ordinance, procure a license. The ordinance therefore, requires all dealers, those who buy to sell again, to take out a license."

This reasoning would have been equally applicable in the case of the Illinois "Anti-Trust" Act. Under that act producers and raisers were exempted only so long as the combination related to articles produced or live stock raised by them. When those persons attempted to combine with reference to like things not produced or raised by themselves or of any other articles they violated the statute.

There is absolutely no difference between the "Anti-Trust" act and this ordinance in respect to this discrimination. There can be no doubt then that the learned court below erred in the above quotation. That court held this ordinance to be a police regulation. In such case how is it possible to make discriminations. Is it not just as necessary to protect against the manufacturer and producer as against others? Every article sold is manufactured or produced by some one, and a bad article is just as bad in the hands of the manufacturer or producer as it is in the hands of the person to whom he sells it. Neither can there be any presumption that the one class is better morally than the other and therefore more likely to obey the law. These are the things that condemn this ordinance.

This Sunbury ordinance is a general ordinance making it an offense punishable by fine and imprisonment for one person

to do an act that is directly connected with trade and commerce while another person may do precisely the same thing without molestation. This ordinance exempts from its operation manufacturers, producers and others,—the Illinois act exempted the producer or raiser of agricultural products and live stocks. No possible distinction can be drawn between the cases on the point under discussion. The statute and the ordinance both deny the equal protection of the laws.

The learned court below held that the discriminations made by the ordinance were a proper classification and cited the case of *American Sugar Refining Company v. Louisiana,* 179 U. S., 89. That case involved the question of whether a statute that levied a tax on the refiners of sugar that exempted planters and farmers who refine their own sugar, denied the equal protection of the laws. The tax there involved was a tax merely, and the question of its constitutionality arose in a civil action for the recovery of the amount of the tax. The case involved the taxing power and had no similarity whatever to an ordinance of this kind, where the tax involved, as held by the court below, is in the nature of a police regulation. The question involved in the case cited, was as to the power of raising revenue, and had no relation to the subject of regulating the business of manufacturing sugar.

It was the claim of the commonwealth, and the court below held, in positive terms, that this ordinance was enacted in the exercise of the police power under authoriity duly delegated by the state. (Record, p. 12.) In order to sustain the ordinance against the claim that it is a denial of the equal protection of the laws, and, therefore, in violation of the Fourteenth Amendment to the Federal Constitution, the court below cited a case on a subject, that that court held was not involved in this case,

viz., the taxing power. The court below, itself, draws the distinction between the Sunbury ordinance and the Louisiana statute by holding the one to be a police regulation while it refers to the other, a taxing measure, in support of its decision. The confusion of the learned court below respecting this subject is evident.

The discriminations made by this ordinance can not be disposed of by calling it classification. Is it possible to make a proper classification of persons engaged in precisely the same occupation so as to make criminals out of some but not out of others? Is not such "classification" purely *arbitrary selection* of the worst possible sort? Is it a crime to trade? Is it a crime to sell and deliver goods that are the legitimate subjects of commerce? This is a right possessed by every freeman and every law that affects this right in the least must be of equal operation on all.

It is the almost universal custom in cities the size of Sunbury for delivery wagons to be employed by business houses to deliver goods to purchasers. These business houses do not come within the classes exempted by this ordinance. But does any one suppose that each person who delivers goods for the business houses of Sunbury pays for a license under this ordinance —pays the sum of $150 per year for the sole privilege of delivering merchandise to purchasers, or is prosecuted for a failure to pay? This would be absurd, but these questions serve to show the purpose of the ordinance. It is well known that ordinances of this character are neither intended as police regulations or revenue measures, but are secretly for the purpose of stifling competition in the interest of local dealers. The exemption made of favored classes is conclusive proof of this. If the ordinance were in good faith, a police regulation, it

would be of general application. It possesses none of the distinguishing features of a proper police regulation as we have pointed out above. It imposes burdens on one class of individuals that it does not impose on another class similarly situated with reference thereto. It casts one person into prison for doing an act which if done by another is no crime. It is depriving the one of his liberty and property while letting another go free.

It is unnecessary to dwell upon the value of liberty to mankind. It is at least the second in value of man's possessions and by many regarded as first. How then can an ordinance, however it may be regarded, which possesses such flagrantly unequal provisions be enforced so as to deprive persons of this fundamental right? Is it not plain that an ordinance of this character is an arbitrary exercise of the power of government, and is therefore unreasonable, unconstitutional and void?

The following declarations by Mr. Justice Harlan in the Connolly case is to the point:

> *"Equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that no impediment should be interposed to the the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens could be laid upon one than are laid upon others in the same calling and condition."* (The italics are counsels.)

B.

The Sunbury Ordinance Discriminates Against Persons who "Sell at Retail by Sample or Otherwise," or who "Solicit Orders at Retail," or "Who Solicit Orders for Sell or Deliver at *Retail*, Goods not of Their Own Production or Manufacture.

It will be seen that there is an arbitrary selection made here between one who solicits orders for and delivers goods at retail and another who solicits orders for and delivers goods at wholesale.

We are unable to conceive how one person going from place to place, taking orders and delivering merchandise, can have greater personal or civil rights than another who does the same things. The fact that one delivers goods to a merchant at his store should not entitle him to greater rights in Sunbury than one who takes the order and delivers goods to another person in the borough. Because the person to whom goods are delivered is a merchant or dealer is not a reason why the person who delivers them should be exempt from the operation of a general ordinance which makes it any offense to deliver goods without license. Rights under the law are based on one's rights as an individual and not upon any business in which he may be engaged. This exemption of the Sunbury ordinance clearly shows its object, which is, as pointed out in the next preceding subdivision of this brief, to be, for the sole purpose of creating a monopoly in the local dealers. If a man solicits orders from or delivers merchandise to dealers, whether or not the same be of his own production or manufacture, he is not required to take out a license. This shows the utter absurdity of the claim that this ordinance is a

just and proper police regulation or for the purpose of raising revenue, though the latter may be the result of its operation. Can it be claimed that merchants and dealers are a superior class, more capable of judging of the quality of goods and therefore less in need of protection than other persons? Who is to judge of this? There may be and undoubtedly are in Sunbury retired dealers, to whom a sale without license could not be made without a violation of this ordinance. Why should there be a discrimination between the person who sells to the active dealer and the one who sells to a person who retired from business but yesterday? Is not such discrimination the plain denial of the equal protection of the laws? Persons who usually purchase for a household are as familiar with the quality of the goods as our dealers, and quite as capable of judging. If this ordinance were a just police regulation it would be of equal operation on all. It would protect the people of Sunbury against their local dealers as much as against others. An offense is equally great in the eyes of the law whoever may commit it, and for the law to provide otherwise is the most arbitrary and unjust exercise of the power of government.

Under this ordinance A, a wholesaler, has the privilege free and unstricted of delivering to X, a dealer, 25 pounds of coffee, while B, a retailer, cannot deliver 25 pounds of the same commodity to Y, an inhabitant not engaged in trade, without having to pay for the privilege, and on failure to pay, be criminally liable. Neither A or B, in the case supposed, has his place of business within the borough and both employs the same method in delivering the coffee, which neither produces nor manufactures. This illustration shows the unequal operation of the ordinance. A and B are both engaged in trade,

"which is, of right open to all, subject to such regulations applicable alike to all in like conditions, as the state may legally prescribe." *Conolly* v. *Union Sewer Pipe Co.*, supra. This the ordinance plainly denies and it is therefore unconstitutional and void.

C.

THE SUNBURY ORDINANCE HERE IN QUESTION DISCRIMINATES IN FAVOR OF MERCHANTS AND DEALERS IN THE BOROUGH ON THE ONE SIDE AND AGAINST THE REST OF THE WHOLE BODY OF THE INHABITANTS OF THE BOROUGH ON THE OTHER.

We have just seen how a person may go to a merchant of the borough and take his order for such goods as he may desire to purchase, and deliver the same to him without being required to take out a license for the privilege. If, however, a person goes to the house of an individual to take his order for such goods as he may desire to purchase, and subsequently delivers the same, he, the seller, must first procure a license, that is, secure a permit, and, on failure to do so, be punished for the offense. In other words, A, B and C, who are merchants in the borough, can purchase goods from an agent who is unhampered by a license tax, who is free to move from place to place and take orders for, and deliver goods without his right to do so being questioned by anyone. On the other hand, E, F and G, who are not merchants, but common, ordinary individuals, cannot give orders for goods to an agent in their own houses and have the same delivered to them without such agent shall first obtain a license for the privilege. It is very clear that an ordinance of this kind not only operates on the person who takes the orders but also on the purchasers. The merchants may contract with a man who is free and un-

hampered, while the non-merchant must contract with a man who brings the burden of this license ordinance upon his shoulders. This burden, if not prohibitive, at least tends to restrict, to hamper, to annoy, to interfere and to obstruct a salesman in many ways to induce him to stay away from prospective customers. This not only interferes with the right of the agent to make contracts of sale free and unhampered, but reacts and has the same effect upon the purchasers. The ordinance is a plain discrimination in favor of a merchant and against a non-merchant. A man's calling, whatever it may be, confers on him no greater personal or civil rights, than is possessed by other individuals. Whatever occupation he may engage in, he is but an individual still, standing on the same ground and enjoying the same personal and civil rights, no more, no less, than other individuals. The question is, has any person in Sunbury any greater rights and privileges under the constitution than another person? Can one exercise the great personal right, which every freeman has, the right to make contracts free from restraint, while another cannot? If there is the slightest discrimination in this respect, the ordinance must fail. In the case of *Brennan* v. *Titusville,* 153 U. S., 289, Mr. Justice Brewer speaking of a similar provision of an ordinance, said:

> *"There is no discrimination except between manufacturers and licensed merchants on the one hand and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made."* (The italics are counsels.)

This language has peculiar application to the question now being discussed. There can be no just law that restricts one set of individuals in their right to make contracts respecting the purchase of property, while it places no restriction on the right of others to make contracts respecting the purchase of similar property in a similar manner. The right of contract is one of the very greatest rights which men possess. In a civilized state of society it is necessary to their very existence. They get food, shelter and clothing by contract, all of which are necessary to preserve their happiness, comfort, health and life. If the right of contract be restricted in one, in the least degree, does he, it may be asked, enjoy the same protection of the laws, as another in whom the right is unrestricted? The Supreme Court of Ohio in discussing a similar ordinance said, "It places an unwarranted impediment in the way of the buyer and seller in acquiring and disposing of property." *Sipe* v. *Murphy,* 49 O. St., 546. This ordinance is an impediment in the way of the right of the inhabitants of the borough of Sunbury, to acquire and possess property. It is intended to be an impediment in the way of the right of a certain class,—the largest class of individuals in Sunbury, to have free commercial intercourse with people residing outside that borough. This was suggested by Mr. Justice Bradley in the *Robbins case,* supra.

CONCLUSION.

We have demonstrated beyond any possible question that the court below erred in holding that the contracts of sale made by Kunkle did not necessarily involve commerce among the states. But even if the theory of the court below respecting the contracts were correct it would not affect this case. *The delivery of the goods by Rearick that were on their way from*

the seller in Ohio to the buyers in Pennsylvania, was, independently of any other fact, inter-state commerce. However, the sale might have been made, whether by soliciting of orders by letter, by telegraph or by other method, the delivery of the goods from another state, in the manner employed by the plaintiff in error, was inter-state commerce and protected from local interference, burden, or tax, regardless of the nature of the statute or ordinance imposing it, by the commerce clause of the Federal Constitution.

The ordinance is void in itself for the reason that it makes arbitrary discriminations between persons and thus denies the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution. *In no case* then, could this ordinance be made the basis of a valid conviction.

The plaintiff in error is clearly entitled to a reversal of the judgment of the court below and to his discharge.

Respectfully submitted,

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APPENDIX.

Sunbury Ordinance of December 9, 1899.

An Ordinance, To provide for the licensing of canvassers and all other persons who sell at retail, by sample or otherwise, or who solicit orders at retail or who solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own production or manufacture, and imposing a penalty for a violation of this ordinance.

Section 1. Be it enacted and ordained by the Borough of Sunbury, in town council assembled, and it is hereby enacted and ordained by the authority of the same, that after the passage of this ordinance it shall be unlawful for any person or persons to sell at retail, by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell or deliver at retail, either on the streets or by traveling from house to house within the limits of the Borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise or fruits, not of their own manufacture or production, without first obtaining from the chief burgess of the Borough of Sunbury a license for such purpose.

Section 2. The license fee required to be paid under this ordinance shall be as follows: For one day, two dollars; for one week, ten dollars; for one month, twenty dollars; for three months, fifty dollars; for six months, one hundred dollars; for one year, one hundred and fifty dollars.

Section 3. Any person or persons violating this ordinance by selling, canvassing, soliciting or delivering as aforesaid, without having first obtained and paid for a license as required in sections one and two of this ordinance, shall, upon conviction thereof before any magistrate or justice of the peace residing in the said borough, forfeit and pay a fine not exceeding fifty dollars and not less than twenty-five dollars, for the use of the borough aforesaid, for each and every offense, together with costs of prosecution; the costs of the magistrate, justice of the peace and constable to be the same as the costs fixed by law for them in similar cases. And any person or persons so convicted and fined, in default of payment thereof, together with costs aforesaid, shall be forthwith confined in the common jail for the county of Northumberland, for a period of not less than fifteen and not more than ninety days until such time as the costs and fine imposed, together with the prison charges accrued, be fully paid and satisfied.

Section 4. The word "retail" as used in this ordinance shall be construed to mean in small quantities, such as are usually immediately called for by customers.

Section 5. All ordinances or parts of ordinances inconsistent herewith be and the same are hereby repealed.

Approved December 9, 1899.

P. H. Moore, Chief Burgess.